INDEX

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTE INVOLVED 2

CONSTITUTIONAL PROVISION INVOLVED 2
STATEMENT 3

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 7

APPENDIX A-1

CITATIONS

CASES:

U. S. v. Clark, 96 U. S. 37
(24 L. Ed. 696 5
Reed v. Murphy, 232 F. 2d 608
77 S. Ct. 45, 352 U. S. 831. 5
U. S. v. Pugh, 99 U. S. 265
25 L ed. 322 4
Jones v. U. S. 226 F 2d 24 (1955) 6
Charleson Realty Co. v. U. S.
Ct. Claim No. 388-62, (1967) 6
U. S. v. Johnson, C. A. Tex. (1953)
208 F. 22, 729 7
Gee Chee On v. Brownell
C. A. Tex. 1958, -253 F. 2d 814 7
Oliphant v. Brotherhood of Locomotive

Firemen & Enginemen, 156 F. Suppl. 89
78 S. Ct. 266. 355 U. S. 893, 2 L ed. 191. 7
U. S. v. Kaplan, C. A. 5th -277 F. 2d. 405 (1960)= A-13
Orvis v. Higgins. C. A. 2d. 180 F 2d 537 A-13
Federal Radio Comm. v. Nelson Bros.
289 U. S. 266, 270. A-14

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. ----------

JEROME FELD,

Petitioner,

v.

THE UNITED STATES,

Respondent,

Petition for a Writ of Certiorari To The United States Court of Claims

---

Jerome Feld, Petitioner, respectfully requests that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Claims in the above entitled cause.

Petitioner further states that on January 17, 1969, he did cause to be filed a application for a extension of time to file for said petition for a writ of certiorari. Such time limitation has been extended by a order of the Honorable Chief Justice of the Supreme Court until April 13, 1969.

OPINION TO BE REVIEWED,
DELIVERED IN THE COURT BELOW

The opinion delivered by the court below is in the United States Court of Claims No. 217-66, decided November 15, 1968 and set out infra in the appendix at page A-1.

JURISDICTION

As ground on which to invoke the jurisdiction of this court, petitioner relies on Title 28 U. S. Code, Section 1255, and alleges and verily believes that the special and important reasons justifying a grant of review on writ of certiorari in the sound judicial discretion of this court within the meaning of Rule 19 are:

The opinion of the Court below decides an important question of Federal law, which has not been, but should be settled by this court.

QUESTIONS PRESENTED FOR REVIEW

1. Was it a violation of due process of law to discharge a federal career employee without authority of law, since it took effect as a result of a decision and failure to review on appeal, both of which occurred while a allegation of discrimination which related to the discharge action had been filed but not brought to a conclusion.

REGULATION INVOLVED

Title 5, Code of Federal Regulations, Section 771.222 clearly provides that such discharge prior to review and termination is improper.

CONSTITUTIONAL PROVISIONS INVOLVED

Ammendment 5:
"No person shall be ..... deprived of life, liberty, or property without due process of law ...."

STATEMENT

Petitioner, a career civil service employee, was employed with the Navy Department as a engineering technician No. 90 A 31286, at the Naval Applied Science Laboratory, Brooklyn, New York.

Plaintiff had filed a discrimination action requesting a hearing. This complaint was filed on or about November 4, 1964. Subsequently, on November 25, 1964, plaintiff was notifiied of his proposed separation for medical reasons. To this date there had been no hearing on his discrimination complaint, nor on the date of his eventual discharge. Petitioner was then discharged from his employment for alleged medical reasons on February 11, 1965. Hearings on his complaint of discrimination were eventually held on March 23 through April 1, 1965. Such hearing and evidence were reviewed by the Navy Department and after receiving a adverse decision from them, such ruling was appealed by the petitioner to the President's Commission, who turned it over to the Board of Appeals and Review of the Civil Service Commission, acting as the review body. A decision unfavorable to the petitioner was handed down by the Board on October 20, 1965.

It was after this ruling on his dismissal that plaintiff did cause the action to be brought before the court of Claims. In his initial complaint before this Court plaintiff clearly states that he felt his position was terminated because of discrimination practices, which were reviewed as stated above. At his hearing pending his medical discharge plaintiff did state and make part of the record his convictions that his proposed medical separation was the result of his filing a complaint in November, 1964, alleging discrimination.

Immediately upon his discharge petitioner did file a timely appeal with the Navy Department. After the time alloted and since the Navy took no action on his appeal, he did in accord with regulations remove his appeal to the New York Regional Office of the Civil Service Commission.

Notice of docketing and probable jurisdiction for plaintiff's appeal on his discharge was given by the commission on April 16, 1965. On May 10, 1965, the commission informed the plaintiff that it was without jurisdiction in his case since there was no adverse action which to appeal and therefore he had no further recourse to administrative remedies.

Despite this misleading information, petitioner on May 14, 1965, sent a letter directly to the Board of Appeals and Review of the Civil Service Commission complaining of the action taken by the N. Y. Regional Office and requesting review and clarification.

There was no reply and finally after the adverse decision on his discrimination complaint of October 20, 1965, plaintiff sought relief in the courts. A petition was filed by counsel on behalf of petitioner under Title 28 U. S. Code Section 1941, in the Court of Claims on June 23, 1966. The petitioner felt that he had in good faith exhausted all of his administrative remedies and did seek judgment for the alleged unlawful termination of his employment. The Court by its order of November 15, 1968 (infra appendix p. A-1) did deny petitioner a trial on the merits.

REASONS FOR GRANTING THE WRIT

The gravamen of the Court of Claims opinion was ..... . " that there is no credible evidence that plaintiff appealed from the May 10, 1965 decision of the N. Y. Regional Office of the Civil Service Commission". In reaching its conclusion the court completely disregards the evidence presented and accepts the trial commissioner's report verbatim. In doing so it disregards established rules of law and evidence.

" The judgment of the Court of Claims as to the legal effects of the ultimate circumstantial facts in a case may be reviewed by the Supreme Court".

U. S. v. Pugh, 99 U.S. 265, 25 L ed. 322.

The Court of Claims simply overlooks the legal facts that the petitioner in his original petition filed with the court states that the basis of his discharge did stem from reasons of discrimination. The respondent on the other hand has never denied the fact that the October 20, 1965 adverse decision in petitioner's discrimination action was reviewed by and the decision given forth by the Board of Appeals and Review of the Civil Service Commission.

Hence it would appear that in reality the highest administrative agency did in fact review petitioners discharge from federal employment. There can be no logic or legal reasoning to indicate that petitioner did not exhaust all administrative remedies prior to seeking redress in the courts.
" When the Court of Claims sends as part of its finding of facts, all of the evidence on which such essential facts were found and there is no legal evidence to establish such fact, the Supreme Court must reverse such judgment".
U. S. v. Clark, 96 U. S. 37 -24 L ed. 696.

The court of Claims gives no legal reasoning for not accepting the sworn testimony of plaintiff or accepting the affidavits of Messrs. Goins or Gennone, sworn into evidence upon motion of the respondent. It denies the testimony of the F. B. I. expert, brought in at the request of the respondent, when this expert testifies that there is no proof to indicate that the documents and the evidence are not exactly what they are purported to be.

"Where reliability and truthfullness of witnesses are in no way impugned and they have no self interest to gain or lose and nothing contradicts their testimony, trial court could not disregard such testimony".

Reed v. Murphy, 232 F 2d. 608 . 77 S. Ct. 45. 352 U. S. 831.

It then becomes apparent that:

1 - Plaintiff did appeal the N. Y. Regional Office's decision of May 10, 1965 to the Board of Appeals and Review of the Civil Service Commission, in a letter dated May 14, 1965. (Plaintiff's exhibit number 4. Tr. p. 10 et seq.).
2- Said letter (Plaintiff's exhibit 4) was posted in the United States mails on or about May 14, 1965. Tr. p. 10) see also affidavits of Messrs. Goins and Gennone, introduced into evidence by the respondent and contained in defendant's exhibit No. 11.
3- No evidence has ever been put forth by the defendant to indicate that said letter is not exactly what it is purported to be and was in fact prepared and posted on the date specified.(Tr. p. 74)
4- Judicial notice is taken that the defendant is the United States and the postal service is an agency thereof.
5 - Upon posting, said letter came under the exclusive care, control and dominion of the defendant.
6- Said letter is presumed to have been delivered to the addressee. (Jones v. U. S. 226 F 2d. 24 (1955)
See also Charleson Realty Co. v. U. S. (U. S. Court of Claims No. 388-62, decided October 13, 1967 and cases cited therein.
7 - That the Board of Appeals and Review of the U. S. Civil Service Commission is the final administrative authority (5 CFR 831. 107 (a) and that the petitioner did in good faith exhaust his administrative remedies within the purview of current regulations and did in fact make a timely appeal as provided in CFR 831. 107 (a).

It now would appear that a Federal court having before it a valid complaint and cause of action arbitrarily refuses hearing such cause on its merits. In so doing the court dismisses the action without citing any substantial factual or legal reasoning.

Petitioner does submit that the court's ultimate findings (infra appendix p. A-1) is clearly erroneous when measured by applicable decisional

law, as well as Rule 52 (a) F. R. C. P.

As to the evidence presented, the following clearly supports petitioner's viewpoint.

" Where testimony of a witness was unimpeached and uncontradicted, and its credibility was in no manner brought into question, the judge could not reject such testimony or find contrary thereto".

U. S. v. Johnson C. A. Tex. (1953)
208 F. 2, 729

"Although a trial judge does not have to believe a witness if there is reasonable cause not to believe him, a trial court may not arbitrarily reject the testimony of a witness whose testimony appears credible".

Gee Chee On v. Brownell
C. A. Tex. (1958) 253 F. 2d 314.

Petitioner further states that he was separated as a result of discriminitory practices.
"Where it arises under the Fifth Amendment to the Constitution ... that federal action is responsible for discriminitory practices in labor relations and such discrimination deprives citizens of life, liberty or property without due process of law, such federal action is repugnent to the Constitution.

Oliphant v. Brotherhood of Locomotive Firemen and Enginemen, 156 F. Suppl. 89. 78 S. Ct. 266. 355 U. S. 893, 2 L ed. 191.

CONCLUSION

Such decision of the Court of Claims is erroneous in fact and law and can now only conflict with the Constitution as well as established law and rules of evidence.

It now leaves the law unsettled and uncertain. To grant a Writ of Certiorari would settle these points of law, remove the uncertainty, make clear the

rules of evidence and the rights of litigants in federal administrative and court decisions.

Wherefore, it is respectfully submitted by petitioner that a writ of certiorari be granted in this case.

Respectfully submitted,

Jerome Feld
Petitioner

JEROME FELD
1116 Ave. H.
Brooklyn, New York
11230

A-1

IN THE UNITED STATES COURT OF CLAIMS

No. 217-66

Jerome Feld

v.

The United States

Before Cowen, Chief Judge, Laramore, Durfee, Davis, Collins, Skeleton and Nichols, Judges.

Opinion

Per Curiam: This case was referred to Trial Commissioner Roald A. Hogenson with directions to make findings of fact and recommendation for conclusions of law under the order of reference and Rule 57 (a). The commissioner has done so in a opinion and report filed on February 16, 1968.

Exceptions to the Commissioner's findings and recommended conclusion of law were filed by the plaintiff and the case has been submitted to the court on oral argument of counsel and the briefs of the parties. Since the court agrees with the Commissioner's opinion, findings and recommended conclusion of law, as hereinafter set forth, it hereby adopts the same as the basis for its judgment in this case.

Therefore, plaintiff is not entitled to recover and the petition is dismissed.

BY THE COURT

Wilson Cowen
Judge

November 15, 1968

COMMISSIONER'S ULTIMATE FINDING OF FACT

Upon careful review of the entire record and upon consideration of the demeanor of the witnesses, it is concluded that there is no credible evidence that plaintiff appealed from the May 10, 1965 decision of the Civil Service Commission's New York Regional Office, and that there was no abuse of discretion by the Board in denying as untimely plaintiff's request of March 31, 1967, that the Board entertain an appeal.

Roald A. Hogenson
COMMISSIONER

February 16, 1968

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion, which are adopted by the court and made part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.

BY THE COURT

Wilson Cowen
Judge

November 15, 1968

IN THE UNITED STATES COURT OF CLAIMS

Jerome Feld
430 Williams Ave.
Brooklyn 7, N. Y.

Plaintiff

v

The United States

Defendant

PETITION

1. On November 25, 1964, plaintiff was notified of his proposed medical disability discharge from his career employment position as Engineering Technician, Badge No. 90A 31286, GS-07/06, at the Applied Science Laboratory of the U. S. Naval Station, Brooklyn, New York.

2. The hearing requested by the plaintiff was held December 18, 21-24, 1964.
Pursuant thereto, on February 4, 1964, the Commanding Officer of the Applied Science Laboratory made final the decision that the plaintiff be discharged, same to be effective February 12, 1965.

3. Plaintiff wrote the Commanding Officer on February 4, 1964, requesting that his separation be postponed until a decision had been made on his pending charge of religious and political discrimination which attributed the separation action to bias. The request was denied by letter of February 11, 1965.

4. Timely appeal from the discharge order was made to the Department of the Navy, but no action was forthcoming. It was withdrawn and submitted to the Civil Service Commission.

5. Shortly thereafter, plaintiff filed a application for disability retirement with the Bureau of Retirement and Insurance of the Civil Service Commission.
6. Notice of docketing and probable jurisdiction for plaintiff's appeal of his discharge was given by the Commission on April 16, 1965.
7. On May 10, 1965, the Commission informed plaintiff that it was without jurisdiction because there was no "adverse action" from which to appeal. Such was the case said the letter, because disability retirement had been granted; and the Applied Science Laboratory had then ammended the Notice of Personnel Action to read "Disability Retirement" instead of Separation Disability, thereby changing "the nature of the action".
8. Hearings on plaintiff's allegations of discrimination were held March 23 through April 1, 1965. The decision of July 14, 1965, with its finding of no discrimination was appealed to the President's Commission on Equal Employment Opportunity, who turned it over for review to the Board of Appeals and Review of the U. S. Civil Service Commission, which sustained the holding below on October 20, 1965.
9. Plaintiff submits that the Commission erred in finding that there was no adverse action from which to appeal, since the disability separation order cost him his job and compelled him to seek disability retirement in order to protect his rights thereto.
10. Plaintiff submits that his separation was without authority of law and invalid, since it took effect as a result of a decision and failure to review on appeal both of which occurred while a allegation of discrimination which related to the discharge action, was under consideration; and that such is in contravention of the clear mandate of 5 CFRs771. 222.

11. Plaintiff submits that his discharge was unlawful because the Navy Department failed to consider his appeal as required by 5 CFR (s) 711. 220.
12. Plaintiff submits that his discharge was unlawful because it was made pursuant to notice defective for the following reasons:
(a) No supporting medical evidence was attatched as required by NCPI 352. 4-7 (c) (1) (b).
b. It was not sufficiently detailed.
13. Plaintiff submits that his discharge was unlawful and invalid because it was accomplished pursuant and procedurally defective for the following reasons:

(a) Failure to allow a postponement when plaintiff's representative became unavailable during the course of the hearing.

(b) Failure to allow plaintiff sufficient time to prepare his summation.

(c) Denial of plaintiff's requests for key witnesses (Dr. Spitzer, Mr. Jesse Gibson, Mr. Fried, Mrs. F. Robinson).

(d) Denial of the plaintiff's request for the file in the Lukosevicus case.

(e) Job site inspection by the hearing committee by management at which plaintiff was not represented.

(f) Removal of witnesses before relevant questioning and cross examination had been concluded.

14. Plaintiff submits that his discharge was arbitrary and capricious in that:

(1) other employees are performing similar or more strenuous functions despite physical disabilities.

(2) other employees with impaired physical conditions were not placed on limited duty status, or if they were, they were removed therefrom upon presentation of a physicians note and that such course was not followed in the plaintiff's case.

15. Plaintiff submits that his disability discharge is not supported by substantial evidence.

WHEREFORE, the premises considered, plaintiff respectfully requests judgment against defendant for loss of salary from February 12, 1965 to date, minus disability retirement benefits so far received, in such amount as this court shall deem proper under its rules.

Respectfully submitted,

CARL L. SHIPLEY
Attorney for Plaintiff
1204 National Press Bldg.
Washington, D. C. 20004

OF COUNSEL:

Shipley, Akerman & Pickett
1204 National Press Bldg.
Washington, D. C. 20004

IN THE UNITED STATES COURT OF CLAIMS

Jerome Feld,

Plaintiff,

v.

No. 217-66

The United States

Defendant

PLAINTIFF'S RESPONSE TO DEFENDANT'S REPLY TO PLAINTIFF'S EXCEPTIONS TO THE COMMISSIONER'S REPORT.

Filed: June 25, 1968

Pursuant to Rule 58 (B) (iii) of the Rules of the Court of Claims, plaintiff submits herewith his response to defendant's reply to plaintiff's exceptions to the Commissioner's report. Plaintiff respectfully submits that defendant's reply filed herein on May 15, 1968, completely ignores the central issue upon which this case now rests.

This is the question of the credibility of the plaintiff's testimony, the weighty supporting evidence thereto; and the substantiating affidavits of two witnesses to the preparation and posting of plaintiff's exhibit number 4. (letter from plaintiff to BAR dated May 14, 1965).

It is submitted that defendant is attempting to divert the attention of the Court from the central issue by interjecting and emphasizing the completely meaningless (and undisputed) fact that certain exhibits were typed on one typewriter, whereas others were typed on a different machine.

Clearly then as a matter of law, to say nothing of logic and common sense, if defendant can offer nothing better for argument, this issue must be resolved in plaintiff's favor.

To put it in the vernacular, defendant is kicking a dead horse. No issue exists that could possibly cast doubt on the credibility of plaintiff's presentation. In fact the government's own expert witness (Mr. Marshall) actually substantiates plaintiff's testimony.

Plaintiff freely admitted to owning several typewriters (Tr p. 18-19). It must therefore follow, that there was nothing in Mr. Marshall's testimony for plaintiff to refute since he (Mr. Marshall) conceded (Tr. p. 74) that there was no evidence whatsoever to show that plaintiff's exhibit number 4 was not precisely what it was purported to be; a timely appeal to the BAR. Plaintiff submits that this court is therefore, obliged to accept the aforesaid exhibit and the resulting conclusion that plaintiff had in fact exhausted his administrative remedies as required by law.

The government also implies a sinister inference from plaintiff's failure to appear at the second trial session of November 27, 1967. Nothing plaintiff submits could be a grosser distortion of the facts.

The general substance of Mr. Marshall's testimony was known to plaintiff's counsel beforehand, who saw no need then and sees no need now to require his client to make another trip to Washington, when there could not possibly be anything further to say on the subject.

Plaintiff could not then and can not now refute Mr. Marshall's testimony, because there is nothing to refute.

Plaintiff has not and does not question Mr. Marshall's veracity in the slightest. What is most vigorously challenged is the materiality of his entire testimony as it bears on the genuineness of plaintiff's exhibit number 4.

Lastly, the government offers feeble argument why the substantiating affidavits of Messrs. Goins and Gennone should be ignored. The fallacy here of course is that these affidavits are in evidence on the governments own motion. (Tr. p. 51).

In effect government counsel is now trying to impeach her own witnesses, a shocking disregard for the established rules of evidence.

Had the government wished to, the affiants could easily have been subpoenaed as they are presently employees of the Navy Department and have been for many years. Why should plaintiff bear this burden? Surely he can not be expected to do more than prove his case beyond a reasonable doubt, which the record shows he has already done.

Were there any showing that the plaintiff or the two affiants were known perjurers or some sort of psychopaths, we would have a different situation.

Since this is not the case, failure of the Trial Commissioner to give credence to plaintiff's testimony and to the affidavits can not be other than arbitrary and hence erroneous.

CONCLUSION

Clearly in law or fact the issues are at once clear. The government has not presented a shred of credible evidence to support what few contentions they make. Instead it seems to rely on attempts to confuse the issues. It clutches at straws and strays far and wide from the issues at hand like the four winds.

In short it says nothing which can be truly substantiated by the transcribed record of the trial now before this court.

For the foregoing reasons coupled with those submitted in his exceptions filed herein May 7, 1968, plaintiff respectfully renews his submission that the Trial Commissioner's report be rejected and the court render judgment that plaintiff has exhausted his administrative remedies in the above entitled cause as required by law and is now entitled to his day in court for trial on the merits of his petition.

Carl L. Shipley
Attorney of Record
for Plaintiff

Of Counsel:

SHIPLEY, AKERMAN & PICKETT
Rufus W. Peckham, Jr.
1204 National Press Bldg.
Washington, D. C.
20004

IN THE UNITED STATES COURT OF CLAIMS

Jerome Feld

Plaintiff,

v.

No. 217-66

The United States

Defendant

PLAINTIFF'S EXCEPTIONS TO COMMISSIONER'S REPORT AND BRIEF ON THE FACTS AND THE LAW

Pursuant to rule 58 of the rules of this court, plaintiff submits herewith his exceptions to the Commissioner's report, filed herein on February 16, 1968 and his (plaintiff's) brief on the facts and the law.

Plaintiff specifically excepts to the Commissioner's finding of fact Number 22 (Ultimate finding of fact). Plaintiff excepts to this finding on the ground that it completely ignores inherently credible evidence to the contrary, i.e., that plaintiff did in fact appeal from the May 10, 1965, decision of the New York Regional Office to the Board of Appeals and Review of the Civil Service Commission. This premise is more fully developed in plaintiff's following brief.

BRIEF ON THE FACTS AND THE LAW

The controlling issue in the Commissioner's report, as plaintiff interprets it, is that plaintiff's exhibit number 4 (letter from plaintiff to BAR dated May 14, 1965) is unworthy of credibility and hence by inference is a sham and a fraud. If however, the Commissioner had elected to accept plaintiff's exhibit number 4 for what it is purported to be (a timely appeal to the BAR) then his ultimate finding of fact and his recommended conclusion of law would

unquestionably have been just the reverse of what they were. It would therefore, necessarily follow that plaintiff had in fact exhausted his administrative remedies prior to initiating litigation in this court.
Accordingly, this brief addresses itself primarily to the issue of credibility of witnesses and evidence.

At the outset it must be noted that plaintiff was fully aware of the gravity of his submission of his exhibit number 4 and knew that if he were attempting to perpetrate a fraud upon the court, the consequences would be most serious (Tr p. 42). Surely, it must seem highly unusual for a educated man to deliberately falsify evidence in a civil proceeding and thereby run the awesome risk of imprisonment for perjury. Moreover, there is in the record independent credible evidence to further attest to the genuineness of plaintiff's exhibit number 4, quite aside from plaintiff's own sworn testimony.

At the trial session of September 8, 1967, plaintiff offered into evidence plaintiff's exhibits (for I. D.) number 5 and 6 (Tr. p. 11 and 12) which were affidavits of Messrs. Goins and Gennone. Defendant's counsel objected to the introduction of these items on the grounds of hearsay, which was sustained by the Commissioner (Tr. p. 45-46). Later in the proceedings, these items were admitted into evidence as part of defendant's exhibit number 11(Tr. p. 51). This fact was commented upon by plaintiff's counsel at the time and noted in the record by the Commissioner (Tr. p. 51-52).

It is therefore, quite clear that Messrs. Goins and Gennone's affidavits are in evidence and properly before the court for consideration.

Plaintiff therefore, submits that the Trial Commissioner's ultimate finding of fact and his resulting conclusion of law is erroneous when measured by applicable decisional law, as well as Rule 52 (a) F. R. C. P.

The following citations clearly support plaintiff's premise that such errors exist, and although they

deal with the issue of credibility as respects a appellate court's reversing a trial court, the relationship between this Court's Trial Commissioner and the court itself is virtually synonymous.

"An appellate court may reverse, where findings of the trial court are without substantial evidence to support them, where the trial court misapprehended the effect of the evidence and if, though there is evidence which is credible would be substantial, the effect of the testimony considered as a whole convinces the appellate court that the finding is so against the great preponderance of credible testimony that it does not reflect the truth and right of the case".

U. S. v. Kaplan
C. A. 5th, 277 F. 2d 405 (1960)

"A finding is clearly erroneous (within the purview of FRCP 52 (a) when, though there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed".

Orvis v. Higgins,
C. A. 2nd, 180 F 2d 537 (1950)

In the case at bar, the only evidence whatever offered by the defendant was the F. B. I. technician's testimony that several of plaintiff's documents were typed on the same typewriter and that others were typed on different typewriters (Tr. p. 69.)
This insignificant trivia was not disputed by plaintiff who readily admitted to owning more than one typewriter (Tr p. 17-19) Indeed, plaintiff even offered to allow defendant to examine any or all of his typewriters if they wished (Tr p 24-25). To reject plaintiff's credibility, to say nothing of the two affiants, merely because the same typewriter was used in preparing several different documents can not be other than arbitrary, and:

" A finding without substantial evidence to support it (a arbitrary and capricious finding) does violence to the law".

Federal Radio Comm. v. Nelson Bros.
289 U. S. 266, 270.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Trial Commissioner's ultimate finding of fact and recommended conclusion of law be rejected by this Honorable Court and the judgment rendered that plaintiff in this cause has exhausted his administrative remedies as required by law.

Carl L. Shipley

Of Counsel:

SHIPLEY, AKERMAN & PICKETT
Rufus W. Peckham, Jr.
1204 National Press Bldg.
Washington, D. C. 20004